Supreme Court, U.S.
FILED
SEP 27 2000
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No. 00-317

IN THE

Supreme Court of the United States

JEREMIAH W. (JAY) NIXON, Attorney General,
State of Missouri, *et al.*,

Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

The parent company of the Respondent is Merrill Lynch & Co., Inc., which is the only publicly traded company that owns 10% or more of the stock of the Respondent.

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PRELIMINARY STATEMENT

One critical fact buried obscurely in the petition for writ of certiorari distinguishes this case from all of the cases relied upon by Petitioners. The arbitration proceeding at issue in this case was initiated by Anthony Hoskins, the alleged victim of race discrimination. Merrill Lynch did not initiate the arbitration, and it did not attempt to force arbitration upon Mr. Hoskins. It merely defended itself from the claim that it had terminated Mr. Hoskins' employment because of his race. The result was a finding that Mr. Hoskins was NOT the victim of race discrimination.

From that single fact, it is clear that this case is NOT about the enforceability of arbitration agreements. It is NOT about whether an employee can be made to submit race discrimination claims to arbitration. It is NOT about whether the state officials herein would be bound by an agreement to arbitrate if an employee resisted arbitration. As both the district court and the Eighth Circuit Court of Appeals recognized, this case is about whether state officials can ignore the decision of an arbitration panel, in an arbitration initiated by the employee, that the employee had NOT been discriminated against, and attempt to obtain the same individualized relief for that same employee, on the same claim of discrimination, in violation of the Federal Arbitration Act, the U.S. Supremacy Clause and the common-law doctrines of *res judicata* and claim preclusion.

No decision of this Court or of any of the Courts of Appeal has permitted such a disregard for established law. As discussed more fully below, the petition for writ of certiorari is without merit and should be denied.

CORRECTIONS AND ADDITIONS TO PETITIONERS' STATEMENT OF THE CASE

Merrill Lynch clarifies and/or elaborates on the following factual points appearing in Petitioners' Statement of the Case.

First, the arbitration of the underlying claim of race discrimination was initiated by the alleged victim, Anthony Hoskins. On January 18, 1994, Mr. Hoskins, represented by counsel, filed a Statement of Claim against Merrill Lynch with the NASD, invoking arbitration pursuant to the Federal Arbitration Act and his Form U-4 executed pursuant to NASD By-Laws. Shortly thereafter, Mr. Hoskins filed an Amended Statement of Claim with the NASD, asking the arbitration panel: (a) to declare that his employment termination by Merrill Lynch was due to his race and "discriminatory in nature"; and (b) to award him compensatory, exemplary and punitive damages of $4,000,000 "pursuant to 42 U.S.C. § 1981, Title VII, and Missouri Civil Rights Statutes."

An evidentiary hearing on Mr. Hoskins' claim of race discrimination against Merrill Lynch was held before a three-member arbitration panel of the NASD on November 14, 15 and 16, 1994, in which Mr. Hoskins participated and was represented by counsel. On January 12, 1995, the arbitration panel issued its award which provided in part:

AWARD

> After considering the pleadings, the testimony and the evidence presented at the hearing and the post-hearing submissions, the undersigned arbitrators

> have decided in full and final resolution of the issues submitted for determination as follows:
>
> Claimant Anthony H. Hoskins' claims are, and each of them, denied and dismissed with prejudice.

Second, the factual issues in the NASD arbitration initiated by Mr. Hoskins are identical to the factual issues in the charges brought by the Missouri Commission on Human Rights.

Third, the statement in footnote 4 on page 4 of the Petition for Writ of Certiorari is incorrect. The Commission did *not* allege in its Amended Complaint filed September 21, 1997 (which is the operative complaint in these proceedings) that Merrill Lynch discriminated against "Hoskins and other, unnamed employees," nor did it seek relief for "unnamed employees." That Amended Complaint alleged only that Merrill Lynch had discriminated against *Complainant Anthony Hoskins* in connection with his discharge, and sought an order that Merrill Lynch cease discriminating against Complainant and "pay to Complainant a sum of money for actual damages," lost wages, and emotional damage. No allegation of discrimination against any other person or request for any relief on behalf of any other person appears therein. *See* Joint Appendix in the Eighth Circuit Court of Appeals, pages 40-43.

Fourth, when Merrill Lynch asked the Commission to dismiss the Amended Complaint, the Hearing Examiner agreed that the NASD arbitration award was final and binding on the Commission, and recommended that Merrill Lynch's motion to dismiss be granted. Joint Appendix in the Eighth Circuit Court of Appeals, pages 085-091. The Commission refused to accept the recommendation.

Fifth, Petitioners incorrectly state at page 5 that Merrill Lynch asked "the U.S. District Court for the *Eastern* District of Missouri" to enjoin Petitioners from pursuing their Amended Complaint. Instead, Merrill Lynch asked the U.S. District Court for the *Western* District of Missouri for such relief, as was appropriate.

Sixth, as Petitioners state, the district court enjoined the Petitioners from pursuing monetary relief for Mr. Hoskins but permitted the Commission to proceed against Merrill Lynch for injunctive relief. However, at the time of the district court's order, the Commission had sought no injunctive relief on behalf of Mr. Hoskins or any other person and the issue had not been briefed or argued to the district court.[1]

Seventh, in footnote 5 on page 5, the Petitioners acknowledge that Merrill Lynch asserted collateral estoppel and *res judicata* before the district court, but also state that Merrill Lynch did not "assert" those arguments before the Eighth Circuit. This statement is surprising and disingenuous. Merrill Lynch did not raise appeal points with the Eighth Circuit for the obvious reason that it was not the appellant. Merrill Lynch merely responded to the points raised by Petitioners, who contested federal jurisdiction in the Court of Appeals, but did not address the *res judicata* issue. Certainly Merrill Lynch never abandoned the latter. To the

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1. In a Second Amended Complaint filed with the Missouri Commission on Human Rights on August 31, 1999 — almost four months after the district court's order and therefore, not at issue in these proceedings — Petitioners Jeremiah Nixon and Keith Halcomb asked for an injunction for the first time. That Second Amended Complaint is currently being held in abeyance by the second hearing examiner.

contrary, Merrill Lynch consistently argued to both courts that the Commission could not seek individualized relief for Mr. Hoskins because of the full and fair arbitration hearing which resulted in a decision against him. In response, the Eighth Circuit specifically held, "Under both federal and Missouri law, the principles of *res judicata* and collateral estoppel bar Mr. Hoskins from subsequently relitigating these same claims . . . ." App. A-19 to Petition for Writ of Certiorari.

Eighth, Petitioners state on page 6 that in the Eighth Circuit's holding, the Commission was still permitted to seek injunctive relief. However, the Court of Appeals did not hold that seeking injunctive relief was appropriate. It merely declined to address the point because of the absence of a formal cross-appeal. App. A-24 to A-25 to Petition for Writ of Certiorari.

Ninth, Merrill Lynch invoked the jurisdiction of the federal court under both 28 U.S.C. § 1131 (federal question) and 28 U.S.C. § 1332 (diversity). *See* Joint Appendix in the Eighth Circuit, pages 006-008.

REASONS FOR DENYING THE WRIT

I.

THE EIGHTH CIRCUIT HAD JURISDICTION TO ENJOIN STATE OFFICIALS FROM INTERFERING WITH FEDERAL RIGHTS.

As mentioned above, Merrill Lynch invoked the jurisdiction of the federal court under both 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1332 (diversity). Diversity exists because Merrill Lynch is a Delaware corporation with

its principal place of business in New York. Petitioners are all citizens of Missouri. The amount in controversy exceeds $75,000.

As to federal question jurisdiction, Merrill Lynch claimed that, in attempting to re-determine a discrimination claim on behalf of Anthony Hoskins which had already fully been decided in an arbitration initiated by him, the Petitioners were depriving Merrill Lynch of its rights under the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*, in violation of the Supremacy Clause of the U.S. Constitution, and were violating the principles of *res judicata* and collateral estoppel. Therefore, Merrill Lynch asked for an injunction to prohibit Petitioners' pursuit of that claim. Both the district court and the Eighth Circuit specifically found that federal jurisdiction existed to resolve Merrill Lynch's claims pursuant to *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983), which states:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. *See Ex parte Young*, 209 U.S. 123, 160-62, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. 1331 to resolve.*

(Emphasis added.)

Here, Merrill Lynch sought injunctive relief from application of the Missouri Human Rights Act by state officials in such a way as to ignore a completed arbitration proceeding and thereby interfere with Merrill Lynch's right to engage in meaningful arbitration, a right granted by the Federal Arbitration Act and further protected by the Supremacy Clause.

That the federal courts have jurisdiction to decide whether a state statute, as applied, invalidates arbitration agreements in violation of both the Federal Arbitration Act and the Supremacy Clause was made crystal clear by this Court in *Southland Corp. v. Keating*, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

There, a California court had held that a state law requiring judicial consideration of claims brought under the California Franchise Investment Law did not contravene the Federal Arbitration Act. This Court disagreed, holding both that federal courts have jurisdiction to decide whether application of state law is preempted by the Federal Arbitration Act, 465 U.S. at 8, and that a state law in conflict with the Federal Arbitration Act violates the Supremacy Clause. *Id.* at 16.

Therefore, the argument made by Petitioners that they did not participate in the arbitration agreement here is of no relevance. The point is that they — by their application of a state statute so as to invalidate arbitration already completed and final — attempted to contravene the Federal Arbitration Act and through it, the Supremacy Clause. Such actions fall squarely within the jurisdiction of the federal courts.

Accordingly, the federal courts have jurisdiction over this matter under both 28 U.S.C. § 1331 and 28 U.S.C. § 1332.

II.

THERE IS NO SPLIT IN THE CIRCUITS AS TO WHETHER AN ARBITRATION DECISION, REACHED IN ARBITRATION INITIATED BY AN EMPLOYEE AND FINDING THAT NO DISCRIMINATION HAS OCCURRED, IS *RES JUDICATA*.

No discovered case by any court, decided in any circuit, has ever held that after a full and fair arbitration proceeding, initiated by an employee complaining of discrimination, resulting in a finding that no discrimination has occurred and denying all relief, the result is not *res judicata*.

The Eighth Circuit's decision that such an employee does not get a second bite at the apple with the help of an administrative agency seeking identical relief for the same claim is completely consistent with the long-standing judicial policy of finality of judgments, and the "liberal federal policy favoring arbitration agreements." *See Gilmer v. Interstate/ Johnson Lane*, 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26, 43 (1991).

Petitioners contend that decisions of the Sixth Circuit and Ninth Circuit Courts of Appeal are inconsistent with the Eighth Circuit's decision. That is not the case.

In *EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448 (6th Cir. 1999), it is true that the Sixth Circuit held that the fact that the employee had signed an arbitration agreement did not preclude the EEOC from pursuing

monetary relief on behalf of the employee. However, the court limited its holding at 462 to situations where arbitration had not already taken place, as follows:

> We instead find that principles of preclusion cannot bar the EEOC from suing to "make whole" an individual who has agreed to arbitrate her own claim of discrimination, *where that individual has neither initiated nor participated in an arbitration proceeding in the first place.*

(Emphasis added.)

Here, of course, Mr. Hoskins both initiated and participated in the arbitration proceeding, making the Sixth Circuit decision readily distinguishable.

Likewise, the case of *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999), *cert. granted*, 120 S. Ct. 2004 (2000) is factually distinguishable in that no arbitration had been initiated or participated in by the employee. To the contrary, the case involved an employer attempting to compel an employee to arbitrate his claims asserted under a state discrimination statute. Merrill Lynch, of course, is not invoking the Federal Arbitration Act to compel arbitration herein, but is seeking recognition of an arbitration award already entered against the employee, on both statutory and common-law grounds.

The *Circuit City* holding does not address at all the effect of a completed arbitration upon efforts of an administrative agency to relitigate previously determined claims, as is at issue here.

Accordingly, neither the Sixth Circuit nor the Ninth Circuit is at odds with the decision of the Eighth Circuit herein.

III.

THIS CASE DOES NOT PRESENT SIGNIFICANT ISSUES THAT ARE IN NEED OF RESOLUTION.

Petitioners contend at pages 14-18 that three issues herein warrant the Court's attention. The issues identified are either non-issues or insignificant, as shown below:

1. ***The Waffle House case is not on point.*** Petitioners are correct that if this Court grants the pending petition for writ of certiorari in the *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999), *petition for cert filed*, 68 USLW 3726 (U.S. May 15, 2000) (No. 99-1923), a decision therein would not address the issue in the instant case, namely, whether an arbitration determination that discrimination did not occur, rendered in an arbitration proceeding initiated by the employee, can be ignored by a state administrative agency. That fact alone hardly justifies review of this case. As discussed above, no court from any circuit has endorsed such a disregard for the Federal Arbitration Act and the well-established principles of finality of judgments and *res judicata*.

2. ***State sovereignty is not at issue.*** Contrary to Petitioners' position, the sovereignty of the State of Missouri is not under attack. The Eighth Circuit's decision does not limit the legitimate ability of the Commission to pursue actual damages on behalf of Missouri residents who are victims of discrimination. It limits only the ability of the Commission to pursue actual damages on behalf of persons

who have been found NOT to be the victims of discrimination — a role which even the Commission would have to concede it cannot play.

In addition, although petitioners argue that sovereign immunity under the Eleventh Amendment is at issue, that is hardly the case. As the Eighth Circuit opinion correctly observes (App. A-24 to Petition for Writ of Certiorari):

> In this case, Merrill Lynch does not dispute the MCHR's contention that it is an arm of the state for eleventh amendment purposes, nor does Merrill Lynch suggest that the state's immunity has somehow been waived or abrogated. Indeed, we note that Merrill Lynch admitted in the district court that the eleventh amendment bars an award of injunctive relief against the MCHR.

Accordingly, the Court of Appeals properly dismissed the Commission from the case. (App. A-25 to Petition for Writ of Certiorari.)

That Merrill Lynch's action can legitimately proceed against the remaining individual state officials cannot be seriously contested.

This Court has long recognized that a suit challenging the constitutionality of a state official's action is not one against the State. *Pennhurst State School and Hospital, et al. v. Halderman, et al.*, 465 U.S. 89, 102, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Indeed, "in an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants." *Kentucky v. Graham*, 473 U.S. 159, 169 n.18, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985).

This is so because, as first held in *Ex parte Young*, 209 U.S. 123 (1908), the Eleventh Amendment does not prohibit the issuance of an injunction when a state official attempts to bring suit to enforce an unconstitutional state statute. Because an unconstitutional enactment is void, it does not impart any immunity from responsibility to the supreme authority of the United States. *Id.* at 160. Under the theory of *Young*, "such a suit would not be one against the State since the federal law allegation would strip the state officer of his official authority," and injunctive relief may properly be issued. *Pennhurst* at 102, citing *Edelman v. Jordan*, 415 U.S. 651, 666-67 (1974).

Accordingly, the Eleventh Amendment does not bar the injunctive relief granted herein against the individual defendants.

3. ***Industry wide arbitration agreements are not an exception to the Federal Arbitration Act.*** Petitioners are correct that U-4 agreements are generally required throughout the securities industry. That fact was also true at the time of the decision in *Gilmer v. Interstate Johnson Lane Corp.*, *supra*, in which this Court held that a securities representative's age discrimination claim could be subjected to compulsory arbitration because he had signed an arbitration agreement required of all registered representatives of the New York Stock Exchange. This Court has already determined, then, that industry-wide arbitration agreements are not an exception to the Federal Arbitration Act.

IV.

THE DECISION OF THE EIGHTH CIRCUIT IS NOT INCONSISTENT WITH DECISIONS OF THIS COURT.

As they did before the district court and the Eighth Circuit, Petitioners argue that *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) holds that an individual such as Mr. Hoskins is entitled to a trial de novo despite an adverse arbitral decision. Petitioners remain incorrect on this point.

In *Gardner-Denver*, this Court only held that where a collective bargaining agreement (CBA) requires arbitration, that requirement need not be fulfilled prior to instigating civil rights litigation.

Almost two decades later, in *Gilmer v. Interstate Johnson Lane Corp.*, 500 U.S. 20 (1991), this Court took up the issue of whether an age discrimination claim could be subjected to compulsory arbitration under the same type of arbitration agreement which Mr. Hoskins signed here. In answering that question affirmatively, this Court gave lengthy consideration to *Gardner-Denver*, ruling specifically that Mr. Gilmer's argument that *Gardner-Denver* "precludes arbitration of employment discrimination claims . . . is misplaced." *Gilmer* at 33.

In so ruling, this Court made the distinction that the holding in *Gardner-Denver* was based in part on the fact that the arbitration there "occurred in the context of a CBA . . . . An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case." *Gilmer* at 35. Accordingly, "those cases [*Gardner-Denver* and its progeny]

provide no basis for refusing to enforce Gilmer's agreement to arbitrate his ADEA claims."[2]

This distinction was specifically acknowledged in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361, 368-69 (1998), recognizing that the *Gardner-Denver* holding has been applied by this Court in deciding the effect of CBA arbitration agreements upon employee claims, while *Gilmer*, at the very least, has been followed in individually executed contracts.

The *Gardner-Denver* progeny referred to in *Gilmer* as not providing a basis for refusing to enforce an individual agreement to arbitrate ADEA claims, are the same cases which Petitioners now argue at page 20 of their petition support the conclusion that arbitration decisions do not have a preclusive effect. This Court discussed both *McDonald v. City of West Branch, Michigan*, 450 U.S. 284 (1984) and *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981) in *Gilmer*, and explained at 35 why their holdings are not applicable to individual claims such as Mr. Hoskins':

> Barrentine and McDonald similarly involved the issue whether arbitration under a collective-bargaining agreement precluded a subsequent statutory claim. In holding that the statutory claims there were not precluded, we noted, as in

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2. In *Gilmer*, the Court also noted at page 34 n.5 that *Gardner-Denver* had been decided when arbitration was viewed as "inferior to the judicial process for resolving statutory claims." Such a view, this Court stated, "has been undermined" by more recent arbitration-related decisions. "We are well past the time when judicial suspicions of the desirability of arbitration . . . inhibited the development of arbitration as an alternative means of dispute resolution."

> *Gardner-Denver*, the difference between contractual rights under a collective-bargaining agreement and individual statutory rights, the potential disparity in interests between a union and an employee, and the limited authority and power of labor arbitrators.
>
> There are several important distinctions between the *Gardner-Denver* line of cases and the case before us. First, those cases did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. *Since the employees there had not agreed to arbitrate their statutory claims*, and the labor arbitrators were not authorized to resolve such claims, *the arbitration in those cases understandably was held not to preclude subsequent statutory actions*.

(Emphasis added.)

Because Mr. Hoskins agreed to (and did) arbitrate his statutory claims, *Barrentine* and *McDonald* are likewise inapplicable here, and in no way conflict with the Eighth Circuit's decision.

Likewise, Petitioners' reliance on *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) is misplaced. That case only held that the EEOC may seek classwide relief under Title VII without being certified as the class representative under Rule 23 of the Federal Rules

of Civil Procedure. None of the plaintiffs in that case had already arbitrated (and lost) their discrimination claims.

The only case suggesting the effect upon an administrative agency when a claimant has already arbitrated and lost is *Gilmer* itself. In recognizing that ADEA claims may be the subject of arbitration agreements, this Court commented at 32, "it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." By implication, then, arbitration agreements will preclude the EEOC from bringing actions seeking monetary relief. And if a mere *agreement* to arbitrate can preclude the EEOC from seeking monetary relief, then *a fortiori*, a completed arbitration determining that discrimination did NOT occur will preclude any relief (monetary, injunctive or otherwise) which would be premised on a finding that discrimination did occur.

CONCLUSION

No decision of this Court or any Court of Appeals has held that when a claimant voluntarily initiates and participates in arbitration of a discrimination claim and the result is an arbitral determination that discrimination did not occur, that determination is of no preclusive effect upon an administrative agency seeking the same relief for the same claimant on the same claim. Accordingly, there is no split in the circuits on this issue, and the Eighth Circuit's decision is not inconsistent with the decisions of this Court.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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